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 8 *Admitted Pursuant to JPML Rule 1.4*

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA

11 **IN RE ONLINE DVD ANTITRUST LITIGATION**

12 **This document relates to:**

13 Spears v. Netflix, Inc., et al.,
 14 Case No. 8:09-cv-00665, Middle District of Florida

Case No. M 09-2029 PJH

MDL No. 2029

Hon. Phyllis J. Hamilton

15
16 **FIRST AMENDED CLASS ACTION COMPLAINT**

17 Plaintiff brings this civil action for damages on her own behalf and on behalf of all similarly
 18 individuals against Netflix, Inc. ("Netflix"), Wal-Mart Stores, Inc. ("WalMart Stores") and
 19 Walmart.com, USA LLC ("Walmart.com") for restraint of trade for monopolizing the online DVD
 20 rental and DVD sales markets (online and in stores) and state and allege as follows:
 21

22 **INTRODUCTION**

23 1. Plaintiff brings this class action pursuant to Sections 1 and 2 of the Sherman
 24 Antitrust Act, 15 U.S.C. §§ 1-2, and Sections 4 and 16 of the Clayton Antitrust Act, 15 U.S.C. §§ 15 &
 25 26, against Defendants.
 26
 27
 28

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331, 1332(d) & 1337 and 5 U.S.C. §§ 1-2, 15 & 26.

4. Venue is proper in this District pursuant to 28 U.S.C. §§ 15, 22 & 26 and pursuant to 28 U.S.C. § 1391(b), (c) & (d), because at all times relevant to the Complaint: (a) Defendants transacted business, were found, or acted through subsidiaries or agents present in this District; (b) a substantial part of the events at issue in Plaintiffs' claims occurred in this District; and (c) a substantial portion of the affected interstate trade and commerce described below has been carried out in this District. This Court has personal jurisdiction over Defendants because, *inter alia*, Netflix and [Walmart.com](https://www.walmart.com) are headquartered in this State and each of the Defendants has transacted business, maintained continuous and systemic contacts, purposefully availed itself of the benefits of doing business, and committed acts in furtherance of the alleged conspiracy in this State.

Plaintiff

5. Plaintiff Carla Spears was a Florida citizen for the entire Class Period, and purchased DVDs from Wal-Mart Stores for her personal, noncommercial use in Florida during the Class Period, and was injured by the antitrust acts alleged in this Complaint.

6. Defendant Netflix is a publicly traded Delaware Corporation with its principal place of business at 100 Winchester Circle, Los Gatos, California.

1 the new DVD sales business. The CEOs wanted to discuss ways in which they could reduce or
2 eliminate competition and thereby increase their profits. Reed Hastings, the CEO of Netflix, having
3 "noticed how low Wal-Mart's prices [for DVDs] were," has admitted that he "called the CEO [of
4 Walmart.com] in January and asked if he could have dinner." John Fleming, then the CEO of
5 Walrnart.com, who reported directly to Wal-Mart Stores' CEO Lee Scott, accepted Hastings' invitation.
6 As a result of this dinner meeting, as well as other meetings and exchanges, Defendants entered into
7 the contract, combination, and conspiracy alleged herein. At the time of their initial meeting and prior
8 to entering into to the Market Division Agreement, Netflix and Walmart.com were direct competitors
9 in the online rental DVD market and were potential competitors in selling new DVDs to customers.
10 Wal-Mart Stores and Walmart.com were already selling new DVDs and Netflix was preparing to enter
11 that market. No later than May 19, 2005 however, Netflix, Wal-Mart Stores, and Walmart.com
12 entered into an agreement whereby Walmart.com would stop competing with Netflix in the online
13 DVD rental market, and in return, Netflix would promote the sales of new DVDs by Wal-Mart Stores
14 and Walmart.com. Netflix also agreed not to sell new DVDs that would have been in direct
15 competition with Wal-Mart Stores and Walmart.com.

18 14. Wal-Mart Stores actively participated in this conspiracy. This is confirmed by, among
19 other things, the fact that prior to the announcement of the Market Division Agreement, John Fleming
20 was promoted to Chief Marketing Officer of Wal-Mart Stores. As of the time of the announcement of
21 the Market Division Agreement, Fleming thus was acting in his capacity both as the Chief Marketing
22 Officer of Wal-Mart Stores and the Wal-Mart Stores executive responsible for overseeing the
23 operations of Walmart.com. As Chief Marketing Officer of Wal-Mart Stores, Fleming was responsible
24 for deciding "what the largest, most powerful retailer in history will stock on its shelves, and how
25 much those products will cost. Such decisions, when made at Wal-Mart, can help make or break entire
26 industries."
27
28

1
2 15. As a result of the Defendants' contract, combination, and conspiracy, Netflix was
3 able to charge its customers higher subscription prices for the rental of DVDs than it otherwise would
4 have been able to charge. In addition, Netflix unlawfully acquired and maintained market and
5 monopoly power.
6

7 16. Under the Market Division Agreement, Netflix, Wal-Mart Stores, and Walmart.com
8 agreed that they would restrain trade and eliminate competition. Wal-Mart Stores and Walmart.com.
9 agreed that Walmart.com would stop competing with Netflix in the online DVD rental market and
10 Netflix agreed that it would not sell new DVDs and instead would promote the DVD sales of Wal-
11 Mart Stores and Walmart.com.
12

13 17. In agreeing to promote the sale of DVDs by Wal-Mart Stores and Walmart.com, Netflix
14 provided consideration for the agreement by Wal-Mart Stores and Walmart.com to exit the online
15 DVD rental market and simultaneously confirmed to Wal-Mart Stores and Walmart.com that Netflix
16 would not enter the market to sell new DVDs. Netflix was well positioned to enter the new DVD sales
17 market, and had the unilateral economic incentive to do, so but refrained from doing so as a result of
18 the Market Division Agreement. Since entering into the Market Division Agreement, neither Wal-Mart
19 Stores nor Walmart.com has rented DVDs online and Netflix has not sold new DVDs. The Market
20 Division Agreement served to entrench and enhance Defendants' dominant market positions and
21 otherwise harmed competition, including by enabling Wal-Mart stores to charge higher prices for new
22 DVD sales than it would have charged had it not entered into the agreement. In fact, Plaintiff and all
23 other similarly situated customers paid the higher prices to Wal-Mart than they otherwise would have
24 paid.
25

26 18. The relevant market is the DVD market, both online rental and sales.
27
28

1 19. The Market Allocation Agreement is *per se* illegal, as well as anticompetitive and
2 illegal under the Rule of Reason.

3 20. At all relevant times, there have been no reasonably interchangeable substitutes for the
4 service of online DVD rentals (which are uniquely priced on a subscription basis unlike pay-per-view
5 rentals) or DVD sales. The DVD sales market, however, is a distinct market from online rentals. For
6 example, the price to buy a new DVD depends heavily on how popular it is, including whether it is a
7 new release or how successful the title originally was at the box office or on television. By contrast,
8 online DVD renters generally charge based on a subscription fee, regardless of whether the consumer
9 is renting popular or obscure DVDs. The industry and the public perceive online DVD rentals as
10 separate from DVD sales, whether in-store or online. The factors motivating a consumer to buy a DVD
11 are different from those that lead to renting a DVD. The former generally applies to DVDs that the
12 consumer intends to view (either personally, or their family or friends) numerous times. The latter
13 generally applies to DVDs that the consumer intends to view once and then return. DVDs sold at retail
14 have other distinguishing characteristics, such as packaging and special features not available with
15 rentals, which are delivered unadorned in envelopes. In addition, the fact of whether a DVD is new or
16 used is not an issue in rental, but is a significant factor in sales, for used DVDs are sold at a significant
17 discount to their new counterparts. DVD sales and online rentals also are not reasonably
18 interchangeable for consumers intending to collect physical DVDs or to give a DVD as a gift. The
19 cross-elasticity of demand between these products and services is such that a significant non
20 transitory increase in price would not cause consumers to switch from online renting to purchasing
21 DVDs, and *vice versa*.

22 21. The geographic market for DVD sales as a result of the entry of online sales was
23 increasingly the United States, which is precisely the reason Wal-Mart agreed to restrict its online
24 rentals in exchange for Netflix's agreement to restrict online sales. Sales of DVDs online would have
25 cut into Wal-Mart's in-store sales nationwide, and the Market Allocation Agreement not only precluded
26 that competition with Netflix, but turned a competitor into a promoter for Wal-Mart. For example,
27 Business Week reported on August 31, 2006, that the online sales by Apple Computer also forced Wal-
28

1 Mart to lower its DVD sales prices to be competitive. Online search sites such as
2 www.dvdpriceresearch.com also monitor and direct buyers of DVDs to the most competitively priced
3 DVDs whether that be through Walmart.com or other sellers of DVDs.

4 21. Even though DVD sales volumes have continued to increase, pricing has been falling for
5 years. Without the Market Allocation Agreement, prices would have fallen faster and further. Plaintiffs
6 and the other members of the Class paid higher DVD prices to Wal-Mart and Walmart.com than they
7 otherwise would have paid. Wal-Mart is the largest seller of DVDs with a 40% market share of the
8 almost \$25 billion annual market. According to the trade group Digital Entertainment, the U.S. DVD
9 sales market peaked in 2004 at \$24.9 million and has fallen every year since then to \$22.4 million in
10 2008.

11 22. The Market Allocation Agreement was not in the independent self-interest of Wal-Mart
12 Stores, Walmart.com, or Netflix. Neither Wal-Mart Stores nor Walmart.com would have wanted
13 Walmart.com to withdraw from the online rental market, encourage its subscribers to be transferred to
14 Netflix, and promote Netflix's rental business absent substantial consideration from Netflix, such as an
15 agreement not to compete for new DVD retail sales. But for the Market Allocation Agreement,
16 Walmart.com would not have exited the Online DVD Rental Market when it did. Likewise, Netflix
17 would not have foreclosed its opportunity to sell DVDs to its millions of subscribers—a base of
18 customers who purchase on average 25 DVDs per year each—and would not have promoted new DVD
19 sales by Wal-Mart Stores and Walmart.com, rather than its own sales, absent an agreement from them
20 not to compete against Netflix's online rental business.

21 23. Defendants' market allocation scheme is a naked restraint of trade; it was not and is not
22 ancillary to any legitimate business collaboration. Rather, the market allocation scheme was a core
23 activity of the Market Allocation Agreement itself. The co-promotion aspects of the Agreement were a
24 means to reinforce the market allocation. To the extent that those aspects were portrayed as the sole
25

1 reason for the Market Allocation Agreement, that portrayal was misleading and pretextual, allowing
2 Defendants' market allocation conspiracy to escape scrutiny and "hide in plain sight."

3 24. This action is brought by Plaintiff individually and on behalf of all other similarly
4 individuals in the United States, and pursuant to Federal Rules of Civil Procedure 23(a), 23(b) and
5 23(c) as representatives of a class (the "Class").

6 25. The Class is defined as:

7 Any person in the United States who purchased DVDs from Wal-Mart Stores from
8 May 19, 2005 - present.

9 Excluded from the Class are governmental entities; Defendants, their Reed Hastings,
10 John Fleming, Defendants' parents, subsidiaries, and other affiliated entities; and
11 presiding judges in this case and their spouses, persons related to either of them within
12 the third degree of relationship.

13 26. Plaintiff reserves the right to expand, modify or alter the class definition, including the
14 time period, in response to information learned during discovery.

15 27. Plaintiff does not presently possess information identifying the exact size of the Class.
16 Based upon the nature of the trade and commerce involved, Plaintiff believes the total number of class
17 members is in the millions and sufficiently numerous such that joinder of all Class members would be
18 impracticable.

19 28. Numerous questions of law or fact arise from Defendants' anticompetitive conduct
20 which are common to the class. Among the questions of law or fact common to the class are:

21 a. Whether Defendants engaged in a contract, combination, or conspiracy to
22 allocate markets;

23 b. Whether Defendants unreasonably restrained trade in the online DVD Rental
24 and DVD sales markets;

25 c. Whether Defendants conspired to reduce competition in the online DVD Rental
26 and sales Markets;
27
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1 d. The nature and character of the acts performed by Defendants in the furtherance
2 of the alleged contract, combination, and conspiracy;

3 e. Whether the alleged contract, combination, and conspiracy violated the
4 Sherman Act;

5 f. The anticompetitive effects of Defendants' violations of law;

6 g. Whether the conduct of Defendants, as alleged in this Complaint, caused Wal-
7 Mart's DVD sales prices to be higher than they otherwise would have been and thereby caused injury
8 to the business and property of Plaintiff and other members of the Class;
9

10 29. These common questions of law or fact are common to the class, and predominate over
11 any other questions affecting only individual class members.

12 30. Plaintiff in this proposed class action asserts claims typical of those of the individual
13 members of the proposed Class. Plaintiff has no interests antagonistic to those of the Class, and
14 Defendants have no defenses unique to Plaintiff.
15

16 31. Plaintiff will fairly and adequately represent and protect the interests of the members of
17 the Class and has no interests antagonistic to the Class. Plaintiff has suffered the same harm as the
18 members of the Class and has, and will continue to, zealously pursue claims against Defendant.
19 Plaintiff has retained counsel competent and experienced in the prosecution of complex class actions,
20 and in particular, counsel has broad experience in complex antitrust litigation similar in size, scope,
21 and complexity to the present case.
22

23 32. A class action is superior to the alternatives, if any, for the fair and efficient
24 adjudication of this controversy. The damages suffered by each individual Class member will likely be
25 relatively small, especially given the burden and expense of individual prosecution of the complex
26 litigation necessitated by Defendants' conduct. Thus, it would be virtually impossible for the Class
27
28

1 members individually to redress effectively the wrongs done to them. Moreover, even if the Class
 2 members themselves could afford such individual litigation, the judicial system could not.

3 Individualized litigation presents a potential for inconsistent or contradictory judgments.

4 Individualized litigation increases the delay and expense to all parties and the judicial system due to
 5 the Class;

6
 7 33. Adjudge and decree that Defendants engaged in an unlawful conduct in restraint of
 8 trade or commerce, in violation of the Sherman Act causing antitrust injuries, and that the Court award
 9 Plaintiff and the Class: (i) overcharge damages in an amount to be proved at trial as a result
 10 of the wrongful conduct alleged; (ii) treble such damages; (iii) pre-judgment and post-judgment
 11 interest; (iv) reasonable attorneys' fees, and (v) costs of Court.

12
 13 **COUNT I**
 14 **Sherman Act Section One**

15 34. Plaintiff hereby adopts and incorporates by this reference each of the preceding
 16 paragraphs as if fully set forth herein.

17 35. Defendants have entered into *a per se* illegal market division agreement, in violation of
 18 Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

19 36. In the alternative, if evaluated under the Rule of Reason, the Market Allocation
 20 Agreement is an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act,
 21 15 U.S.C. § 1.

22 37. Prior to and at the time of the agreement, Netflix and Walmart.com were actual
 23 competitors in the Online DVD Rental Market. In addition, Netflix was a potential competitor of Wal-
 24 Mart Stores and Walmart.com in new DVD sales. Wal-Mart Stores and Walmart.com were actual
 25 participants and Netflix was a potential participant, with the means and economic incentive to sell new
 26 DVDs—in the absence of the Market Allocation Agreement.
 27
 28

1 38. Defendants shared a conscious commitment to a common scheme designed to achieve
2 the unlawful objective of allocating the markets for online DVD rentals and new DVD sales. The
3 Market Allocation Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart
4 Stores and Walmart.com agreeing not to compete in that market. The agreement also allocated new
5 DVD sales to Wal-Mart Stores and Walmart.com, with Netflix agreeing to refrain from selling new
6 DVDs in competition with them.
7

8 39. In addition to explicitly or *de facto* agreeing not to sell new DVDs, Netflix also
9 obtained the Market Allocation Agreement by providing potentially valuable promotion to Wal-Mart
10 Stores and Walmart.com. In so doing, Netflix provided significant consideration to Wal-Mart Stores
11 and Walmart.com for their agreement that Walmart.com would withdraw from, and both Walmart.com
12 and Wal-Mart Stores would not compete in, the Online DVD Rental Market.
13

14 40. The Market Allocation Agreement has created significant anticompetitive effects and
15 no pro-competitive benefits. It eliminated competition in the Relevant Markets raising prices paid by
16 consumers for both online DVD rentals and for DVD sales. To the extent that there were any
17 procompetitive benefits resulting from the agreement, they would not outweigh the agreement's
18 anticompetitive effects and could have been achieved by less restrictive means.
19

20 41. As a result of this violation of law, Netflix's subscription prices as well as Wal-Mart's
21 DVD sales prices charged to, and paid by, Plaintiffs and the Class are, and have been, higher than they
22 otherwise would have been.
23

24 PRAYER

25 WHEREFORE, Plaintiff prays for judgment against Defendants, for the relief requested herein,
26 and respectfully request the Court to certify the Class.
27

28 JURY DEMAND

1
2 Plaintiff demands a trial by jury.

3
4 ATTORNEYS' LIEN CLAIM

5
6 Respectfully Submitted,

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14 ATTORNEYS FOR PLAINTIFF

15
16 Certificate of Service

17 I certify that I served all counsel of record herein via the ECF filing system.

18 Paul Rebein